THE COMMISSION ON LAW AND SOCIAL ACTION

of the

AMERICAN JEWISH CONGRESS, N. J. CHAPTER

ANSWERS A QUESTION PRESENTED BY THE

MAYOR'S COMMISSION ON GROUP RELATIONS OF

NEWARK, N. J.

QUESTION: Under the Constitution and statutes of New Jersey, could a municipality enact an anti-bias housing ordinance?

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Municipal Powers

Municipal corporations are political subdivisions of the state. While the courts of a few states apply the doctrine of an inherent right of local self-government "as an implied constitutional restriction on the state legislature to control its municipalities", Rhyne, Municipal Corp. §4-2, p. 62, New Jersey, in accord with the great weight of authority, has denied the existence of any inherent right of local self-government. A municipality, being the creature of the legislature, is a government of enumerated powers, acting by delegated authority, and having only such powers granted to it by statute. Wagner v. Newark, 24 N.J. 467(1957). These grants of powers are, under a liberal construction, deemed to include those of necessary or fair implication, or incident to the powers expressly conferred. See Constitution of 1947, Art. IV, Sec. 7, Para. 11. Fred v. Borough of Old Tappan, 10 N.J. 515 (1952).

Within this framework, and existant no express or implied grant of power directly concerned with bias in housing, we turn to N.J.S.A. 40: 48-2 provides:

> "Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law."

This section has been construed to "constitute an express grant of broad governmental and police powers to all municipalities" and has been "frequently cited as a source of general municipal police powers." Fred v. Mayer and Council Old Tappan Borough, supra, 10 N.J. at 519. In addition, the legislature has expressly granted similar broad police powers to those particular municipalities that operate under the terms of the Optional Municipal Charter Law, L. 1950, C. 210, N.J.S.A. 40:69A-1 et seq. Newark is in this class, for example. See Wagner v. Newark, supra.

That the proposed enactment can be justifiably classified as within the police power, there can be no doubt. Anti-bias housing laws, while scoring a direct blow against bigotry and prejudice, encompass the very significant aspect of making available improved housing facilities for minority groups which have been relegated to slum areas for reasons other than economic hardship. It is of very real concern principally to urban areas, particularly Newark and Jersey City, to avoid the maintenance of ghettos. The concern is not only for the welfare of the peoples subject to the pressures which create the ghettos, but for the "preservation of the public health, safety and welfare of the municipality and its inhabitants" as a whole. Cf., Lewitt v. Division Against Discrimination, 31 N.J. 514, 523 (1950). Furthermore, similar legislation on the state level, the familiar Law Against Discrimination, N.J.S.A. 18:25-1 et seq., expressly states that that enactment be deemed "an exercise of the police power of the State for the protection of public safety, health, and morals." N.J.S.A. 18:25-2.

A Conflicting State Policy

Paradoxically, it is the fact of this exercise of the state's policy in the Law Against Discrimination that gives rise to uncertainty surrounding the scope of the police power and prevents an unqualified affirmative answer to the question posed. As the Supreme Court said in Wagner v. Newark, supra, at p. 480,

"Attached to every ordinance adopted by a municipality is the implied

condition that it must yield to the predominate power of the state... To hold otherwise, would lead to confusion and absurd results."

Compare also, Auto-Rite Supply Co. v. Woodbridge, 25 N. J. 188 (1957), where a Sunday closing ordinance passed by the Township of Woodbridge was not as broadly worded as the state act and contained more stringent penalties. The ordinance was held to contravene state policy, thus making it invalid.

If a municipality adopted an ordinance against discrimination in housing with more stringent provisions than the state law it would be subject to attack as contra to state policy. In addition, the existence of two boards, administering similar legislative declarations could create an unwieldy situation, and raise the objection that this is contra to an intention of the state to maintain uniformity. However, since the present state act is silent on discrimination in private housing, the question is still open as to whether it is considered as effecting a policy against regulation of private property in this manner, or expresses no policy at all in this area, which is to be considered separate subject matter.

Pre-Emption

Language in Wagner v. Newark, supra, raises the further possibility that the Supreme Court appears ready to embrace a sweeping doctrine of pre-emption. In that case, the power of the City of Newark to enact a rent-control ordinance was challenged. After outlining the grants of the police power, the court held that there were specific legislative declarations establishing a state policy contra to the exercise of rent control by local ordinance and voided the municipal enactments. However, the language was broad and indicated that there are areas of state-wide concern which are beyond the realm of municipal authority. The court said (p. 478):

> "But the constitutional mandate to favor municipalities in the construction of statutory grants of power constitutes no warrant to read into these statutes a power that is not there and not intended to be given, Magnolia Dev. Co., Inc. v. Coles, supra, 10 N.J. 223, 227 (1952)

"Provisions for home rule have not given omnipotence to local governments. Matters that because of their nature are inherently reserved for the state alone and among which have been...landlord and tenant relationships...and many other matters of general and statewide significance, are not proper subjects for local treatment under the authority of the general statutes. The broad grant of power under R.S. 40:48-2, supra, and N.J.S.A. 40.69A-29 and 30, supra, relates to matters of local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants, and not those matters involving state policy or in the realm of affairs of general public interest or applicability.

"Were this not so, the municipalities under these general statutes could legislate on any subject not expressly forbidden to them by law, with only the limitation that their action be not inconsistent with the Constitution or other statutes."

The pre-emption approach is criticized strongly in 12 Rutgers Law Rev. at 262. It may be answered in respect to the instant question on the theory that the problems to be solved by anti-bias legislation in housing are peculier to large urban municipalities, and not the greater part of the state.

Conclusion

Notwithstanding the perils reised by the Wagner case, it is the opinion of this writer that municipalities be advised to act in this area, and submit their bold and commendable intentions to the test of the courts.